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Nos. 93-1612, 93-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NationsBank Of North Carolina, N.A., *et al.*,
v. *Petitioners,*

Variable Annuity Life Insurance Company,
Respondent.

Eugene Ludwig, Comptroller of the Currency, *et al.*,
v. *Petitioners,*

Variable Annuity Life Insurance Company,
Respondent.

On Writs Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF AMICI CURIAE TOM GALLAGHER, TREASURER AND INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, *ET AL.*,* IN SUPPORT OF RESPONDENT

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September 8, 1994

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AARP, *Bank Investment Products Survey* (Jan. 1994) 20

Buist M. Anderson, *Anderson on Life Insurance* (1991) 8

Joseph K. Angell, *Treatise on the Law of Fire and Life Insurance* (Boston, Little, Brown & Co. 1854) 10

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Stephen Brobeck, *Credit Life Insurance: The Nation's Worst Insurance Rip-Off* (June 4, 1990) (Consumer Federation of America Report) 2, 3, 19

Conn. Jt. Standing Comm. Hearings, Ins. and Real Estate, 1973 Sess. 18

Florida Dept. of Ins., 1993 Annual Report, 310 (1993) 3

Solomon Huebner, *Life Insurance* (3d ed. 1935) . . . 11

J.H. James, *A Practical Treatise on Life and Fire Assurance; Annuities and Reversionary Sums; and Leases for Terms and For Lives* (London, Doughty & Co. 1868) 10, 12

1 Joseph A. Joyce, *A Treatise on the Law of Insurance of Every Kind* (2d ed. 1917) 7, 8

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Lester W. Zartman, *Life Insurance* (1914) 11

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BRIEF OF AMICI CURIAE TOM GALLAGHER, TREASURER AND INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, *ET AL.*, IN SUPPORT OF RESPONDENT

The Commissioner of Insurance of the State of Florida (Tom Gallagher), the Attorney General (Richard Blumenthal) and the Acting Insurance Commissioner of the State of Connecticut (William J. Gilligan), the Insurance Commissioner of the State of Maryland (Dwight K. Bartlett, III), the Montana State Auditor and Commissioner of Insurance and Securities (Mark O'Keefe), the Attorney General of the State of North Dakota (Heidi Heitkamp), and the Attorney General of the State

of Rhode Island (Jeffrey B. Pine) hereby respectfully submit this brief as *amici curiae* in support of the Respondent in accordance with Supreme Court Rule 37.3. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE *AMICI CURIAE*

All of the *amici curiae* are state governmental officers or agencies engaged in the regulation of insurance underwriting and sales practices, or are the chief legal officers of their states. The regulation of insurance has been confided to the states throughout this nation's history, as currently codified in the McCarran-Ferguson Act, 59 Stat. 33-34, 15 U.S.C. §§ 1011, 1012.

The principal responsibilities of state insurance regulators are to ensure fair treatment of consumers and the solvency of insurers. To that end, we control the representations that insurance agents may make in the sales process, the contract terms that may be offered, and the sales tactics that may be utilized. We also regulate the reserves that insurance underwriters hold, and their actuarial practices, to protect their solvency and ability to meet their obligations to policyholders.

By allowing national banks to sell annuities, which are insurance under the laws of each of our states, the Comptroller's decision ignores the historic role of state insurance regulation and will harm consumers.[1] By way of comparison, the entry of banks into the credit life insurance business caused dramatic increases in the price of that product and in the use of coercive sales tactics, along with a degradation of underwriting standards that can undermine the solvency of insurers. One consumer group has called credit life insurance "The Nation's Worst Insurance Rip-Off," due largely to abusive bank practices. *See* Stephen Brobeck, *Credit Life Insurance: The Nation's Worst*

[1] For example, it has been Florida's view that annuities are insurance for more than 140 years. An 1851 Florida statute provides that insurance companies shall have the power to write insurance, plus the power "to grant, purchase or dispose of annuities." 1851 Fla. Laws ch. 313, § 1(3).

Insurance Rip-Off (June 4, 1990) (Consumer Federation of America Report).

Because of these abuses and the potential for further abuses by banks involved in insurance matters, several state legislatures have adopted "anti-affiliation" laws, which bar financial institutions from certain insurance activities. *E.g.*, Fla. Stat. Ann. § 624.988 (1993); Conn. Gen. Stat. § 38a-775 (1993). The Comptroller's approval of national bank entry into the annuities business works to defeat that state policy and causes the same harms we have experienced in the market for credit life insurance.

The Florida Department of Insurance has comprehensive powers to protect this State's policyholders, including: (i) the licensing of insurance agents and insurers, *id.* at §§ 626.051, 626.776-.797, (ii) the regulation of the financial condition of insurers to ensure adequate assets, *id.* at §§ 625.012-.83, and (iii) control of actuarial practices, rates, and contract terms, *id.* at §§ 625.121, 627.451-.481, 627.401-.919. In 1992, the Department issued over 41,000 licenses to agents and undertook roughly 2,500 enforcement actions against agents, resulting in more than 300 adverse license actions or fines. The Department regulates more than 800 life and health insurers, and in 1992 opened 163 investigations into those companies while conducting examinations of all domestic insurers.

The Florida Insurance Department also manages the Florida Life and Health Insurance Guaranty Association, which stands behind all life insurance and annuity contracts written in the state up to $100,000 of cash benefits. *Id.* at §§ 631.001-.735. Insurer insolvency has been a significant problem in the industry in recent years. Three Florida life insurers were dissolved in 1992, the most recent year for which statistics are available. These companies had more than $600 million of insurance in place. Florida Dept. of Ins., 1993 Annual Report, at 16-17, 310 *et seq.* (1993).[2]

[2] Other insurers were driven into mergers because of their shaky financial condition.

Richard Blumenthal is the Attorney General of the State of Connecticut. William J. Gilligan is the Acting Insurance Commissioner of the State of Connecticut, and is charged with administering and enforcing the insurance laws of the State of Connecticut, including the licensing of insurers and insurance agents, Conn. Gen. Stat. §§ 38a-769 to 38a-800 (1993), and the regulation of the financial condition and insurance practices of insurers, *id.* at § 38a-775.

Dwight K. Bartlett III is the Insurance Commissioner of the State of Maryland, and is charged with administering and enforcing the insurance laws of the State of Maryland. In that capacity he is represented by the Attorney General of Maryland. Md. Ann. Code art. 48A, § 65 (1994).

Mark O'Keefe is the State Auditor and Commissioner of Insurance and Securities for the State of Montana, and has comprehensive powers to license and regulate insurers and agents in that state.

The Insurance Commissioner of the State of North Dakota is responsible to see that all of the laws respecting insurance companies are executed faithfully and must report in detail to the Attorney General of the State of North Dakota any violation of law relative to insurance companies and their officers or agents. N.D. Cent. Code § 26.1-01-03. Heidi Heitkamp is the Attorney General of the State of North Dakota. In her capacity as Attorney General, she is charged with instituting and prosecuting all actions and proceedings in favor or for the use of the State which may be necessary in the execution of the duties of a state officer, such as the Insurance Commissioner. N.D. Cent. Code § 54-12-01.

Jeffrey B. Pine is Attorney General of the State of Rhode Island, which regulates the insurance business through the Rhode Island Department of Business Regulation, which also regulates banking activities. Rhode Island law bars financial institutions from selling insurance. R.I. Gen. Laws § 27-3-47.

SUMMARY OF ARGUMENT

By rejecting the unwarranted expansion of national bank powers sought by the Comptroller of the Currency ("Comptroller"), the court of appeals preserved critical state powers to regulate insurance and protect consumers. Those state powers date from the early years of this nation, and were expressly endorsed by Congress in the McCarran-Ferguson Act. The two statutes at issue, 12 U.S.C. § 92 ("Section 92") and 12 U.S.C. § 24 (Seventh) ("Section 24(7)"), should not be interpreted in derogation of state powers.

Because insurance regulation has been reserved specifically to the states by tradition and statute, petitioners commit a serious error when they ignore state law concerning annuities and insurance. At the time of enactment of Section 92 (in 1916) and Section 24(7) (in 1863), *only* the states had any role in insurance regulation. Accordingly, any construction of those statutes must consider the law of insurance — which was exclusively state law — in 1863, in 1916, and today. State law uniformly has deemed annuities to be insurance.

Moreover, the court of appeals' decision best preserves state insurance law, and federal statutes should be construed, when possible, to preserve state law. *Massachusetts v. Morash*, 490 U.S. 107, 119 (1989). Indeed, the Comptroller consistently has taken the view that federal law preempts all state regulation of national bank activities. If his views were to prevail in this case and on that preemption question, state regulators would lose their ability to regulate annuity activities by national banks. That outcome would leave consumers highly vulnerable to serious abuses that have accompanied bank entry into the sale of other non-bank products.

ARGUMENT

I. BECAUSE INSURANCE LAW AND PRACTICE TREAT ANNUITIES AS INSURANCE, SO DO THE STATUTES IN THIS CASE

Insurance law and practice are particularly important to the Comptroller's interpretation of the two statutory passages at the center of this case.

First, Section 92 reflects the Comptroller's view in 1916 that national banks had no power to sell the products of "fire, life, or other insurance compan[ies]" by "soliciting and selling insurance." To determine whether annuities fall within that statutory language, this Court should ask whether annuities were thought in 1916 to be a product of a "fire, life, or other insurance company" involving the sale of "insurance."

Second, Section 24(7) gave national banks the following affirmative powers:

> [A]ll such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits, by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes. . . .

To determine whether the sale of annuities fits within any of these powers, this Court should ask whether Congress in 1863, or at any point since, had any basis for believing that the sale of annuities was covered by the powers enumerated in the 1863 legislation.

This Court must examine the historical evidence because, contrary to petitioners' suggestion, annuities are an ancient product of insurance companies, not some "cutting-edge" financial innovation of the 1990s that statutes should be stretched to reach. Annuities were familiar to legislators in 1863 and in

1916. Indeed, the annuities NationsBank wishes to sell have a classic fixed-payout option that would have been very familiar to those legislators. NationsBank Pet. App. 36a. The statutes enacted by those legislators must be construed in light of the insurance practices and the state insurance laws of those times.

A. State Insurance Law And Practice Customarily Have Treated Annuities As Insurance

For over two hundred years in this country, annuities have been considered a form of insurance by insurance companies, scholars, consumers, and state legislatures. One insurance expert cogently summarized the relationship between life insurance and annuities (William R. Vance, *Handbook on the Law of Insurance* 32 (3d ed. 1951)):

> [Every individual] must face the risk of living so short a term that his dependents will suffer want and also the risk that he may live so long that he himself will suffer want. Modern life insurance companies assume both these risks. The ordinary life policy primarily cares for the loss of support to the dependents; the endowment or insurance income policy, and the annuity, for the need of the insured in a possible protracted old age.

See Robert I. Mehr *et al.*, *Principles of Insurance* 406 (6th ed. 1976) ("The life annuity is true life insurance. It is insurance against living too long. . . ."); Kenneth Black, Jr. & Harold D. Skipper, Jr., *Life Insurance* 149 (12th ed. 1994) ("annuities are simply another type of insurance, and both life insurance and annuities are based on the same fundamental principles").

Annuities have been part of the insurance business from the beginning of the insurance industry. The very first life insurance company in England was founded in 1698 by the Mercers as "a widow's fund, an annuity scheme." 1 Joseph A. Joyce, *A Treatise on the Law of Insurance of Every Kind* 43 (2d

ed. 1917). The first chartered insurance companies in this country were established in the 1760s for the benefit of families of Presbyterian and Episcopal clergy, and involved annuities. *Id.* at 44-45. In 1812, Pennsylvania granted a charter to the Pennsylvania Company for the Insurance on Lives and Granting Annuities, " the first North American insurer organized for the sole purpose of selling life insurance and annuities to the general public." Black & Skipper, *supra*, at 53.

Certain state governments began to regulate insurance in the 1850s. Buist M. Anderson, *Anderson on Life Insurance* 12 (1991). The states' responsibility for regulating insurance was powerfully reinforced by this Court's holding in *Paul v. Virginia*, 8 Wall. (75 U.S.) 168, 183 (1869), that "[i]ssuing a policy of insurance is not a transaction of commerce" subject to federal law. After that ruling, "the States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978).

This Court changed its view on that interstate commerce issue 75 years later in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), finding that the sale of an insurance policy occurs in interstate commerce and is subject to federal jurisdiction. Congress moved quickly to "restore the supremacy of the States in the realm of insurance" by adopting the McCarran-Ferguson Act in 1945. *United States Department of Treasury v. Fabe*, 113 S.Ct. 2202, 2207 (1993). That statute declares that "the continued regulation and taxation by the several States of the business of insurance is in the public interest," 15 U.S.C. § 1011, and then provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede" any state insurance law "unless such Act specifically relates to the business of insurance." *Id.* at § 1012(b).

This Court has stressed that the McCarran-Ferguson Act was adopted because "Congress clearly remained concerned about the inroads the Court's decision [in *South-Eastern Underwriters Ass'n*] might make on the tradition of state regulation of insurance." *SEC v. National Sec., Inc.*, 393 U.S. 453, 458 (1969). Indeed, Congress declared "expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 430 (1946).

At no time, however, did Congress or any state take any step suggesting that annuities may not be regulated by the states as insurance. As the court of appeals pointed out in this case, all fifty states currently regulate annuities as an insurance product. NationsBank Pet. App. 11a.

The historical and true character of annuities as insurance was acknowledged in *SEC v. Variable Annuity Life Insurance Co.*, 359 U.S. 65 (1959). In that ruling, the Court determined that for the purpose of disclosures under the Securities Act of 1933, certain variable annuities should be deemed securities. Justice Brennan's influential concurring opinion stressed, however, that "the granting of annuities has been considered part of the business of life insurance." *Id.* at 80-81. The Court also found that fixed annuities are insurance and require no securities disclosures. *Id.* at 75-81. That conclusion was reinforced by the holding in *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 206 (1967), that the pay-out portion of even a variable annuity involves "conventional insurance provisions, and thus [is] beyond the purview of the SEC."

B. In 1863 And 1916, Annuities Were Considered Insurance

The general understanding of the nature of annuities when Congress acted in 1863 and 1916 is very important. For example, *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 227 (1979), construed the phrase "business of insurance" in the McCarran-Ferguson Act by looking at the "contemporary

perception" of what constituted "providing insurance" when the law was enacted. That "contemporary perception," the Court wrote, "is highly significant in ascertaining congressional intent." *Id.*

Petitioners have presented no evidence that before the adoption of the National Bank Act in 1863, annuities were considered not to be insurance; indeed, the evidence is all to the contrary. In his 1854 *Treatise on the Law of Fire and Life Insurance*, Joseph K. Angell described immediate, deferred and survivorship annuities as "official forms" of life insurance, and discussed annuity transactions as a primary feature of the life insurance business. Joseph K. Angell, *Treatise on the Law of Fire and Life Insurance* xi, 303-04 n.2, (Boston, Little, Brown & Co. 1854). J.H. James wrote in 1868 that life insurance had two primary forms: ordinary life policies and the issuance of annuities. J.H. James, *A Practical Treatise on Life and Fire Assurance; Annuities and Reversionary Sums; and Leases for Terms and For Lives* 24, 28 (London, Doughty & Co. 1868).

Contemporaneous state law also classified granting annuities as one of the activities of life insurance companies. For example, New York's first general law for regulating insurance companies described them as having the power to "make insurance upon the health or lives of individuals and every insurance appertaining thereto or connected with health or life risks, and to grant, purchase, or dispose of annuities." 1849 N.Y. Laws ch. 308, § 1.[3] *See* 1851 Fla. Laws ch. 313, § 1(3); 1868 Md. Laws ch. 471, § 99; 1869 Mo. Laws ch. 27, § 1; 1850 Wis. Laws ch. 232, § 1.

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[3] The federal petitioners stress that two of the three members of the House subcommittee that originated the 1863 statute were "New York bankers." Fed. Petitioners Br. at 18 n.6. Presumably, such banker-statesmen also knew that annuities were part of the insurance business under New York law.

Petitioners also stress a recent finding by the New York Court of Appeals that even though New York statutes define annuities as insurance, "the weight of authority" holds that annuities are *not* insurance. *New York State Ass'n of Life Underwriters v. New York State Banking Dep't*, 632 N.E.2d 876 (N.Y. 1994). We cannot contrive a coherent explanation of the New York court's surprising decision to read the state statute out of existence, a ruling that reflects an unusual view of the proper powers of the judiciary.

By 1916, when Congress adopted Section 92, the evidence that annuities were considered only to be insurance is even stronger, with more states specifically authorizing insurance companies to sell annuities. *E.g.*, 1915 Cal. Stat. ch. 768, § 1 (annuities are form of life insurance); 1914 N.J. Laws ch. 88, § 1 (insurance corporations empowered to sell annuities); 1909 Okla. Sess. Laws ch. 21, § 3 (insurance corporations may issue annuities). Indeed, the great weight of authority held that annuities were insurance. *E.g.*, William A. Kerr, *The Law of Insurance* 13, 888 (1902) (annuities are insurance contracts governed by insurance laws); Lester W. Zartman, *Life Insurance* 277-280 (1914) (categorizing annuities as life insurance products).

Throughout the relevant period, the prevailing understanding of annuities was captured by the leading insurance authority of the time, Prof. Solomon Huebner of the Wharton School of Finance, also President of the American College of Life Underwriters, in his textbook (*Life Insurance* 155 (3d ed. 1935) (emphasis added)):

> The purpose of the annuity, it is seen, is to protect against a hazard — the outliving of one's income — which is just the opposite of that confronting a person who desires life insurance as protection against the loss of income through premature death. Technically, however, the two types of contracts are closely related to each other, since the cost of both is computed on the basis of similar data and principles. *Sight should not be lost of the fact that annuities are simply another important means of insurance.*

In the face of this powerful historical evidence, petitioners' erroneous constructions of Section 92 and Section 24(7) cannot be maintained. There is no basis for concluding that Congress in 1863 had any doubt that annuities were an insurance activity, or that Congress had any intent to give national banks any insurance powers. Similarly, Congress in 1916 unquestionably understood that "insurance" in Section 92 included annuities, which were solely written by "life . . . insurance companies."

Petitioners argue that this historical evidence is irrelevant because some annuity products are currently structured in a manner different from the annuities sold in 1863 and 1916. That contention has little force since the NationsBank product at issue in this case includes a simple fixed annuity option, which is identical to the annuities sold in 1863 and 1916, and then understood to be insurance.

In any event, petitioners incorrectly argue that the "modern annuities market" includes annuity options that were undreamt of in the nineteenth century. *See* Fed. Br. at 33-35. Petitioners argue that these supposed "modern" innovations include "refund" annuities that return the purchaser's principal at time of death, or deferred annuities with withdrawal options. But in 1868, J.H. James carefully described both "deferred annuities" and annuities in which "an agreed portion of the deposit is returned to the representatives of the annuitant on death." James, *supra*, at 25. In fact, James described both types of annuities as "examples of the more prominent features in Life Assurance now introduced into general use." *Id.* at 24. Petitioners' supposedly modern innovations in annuities are at least 125 years old.

C. Current State Insurance Law Regulating Annuities

Today, the marketing practices and financial conditions of all insurers are regulated by the states. That includes the companies' sale of annuities as illustrated by the following regulatory synopses of state laws within the purview of the amici curiae.

1. Florida

Florida recognizes annuities as insurance in a variety of ways. The very definition of "insurer" includes an indemnitor, surety, or contractor entering into annuity contracts, § 624.03, Fla. Stat. Ann. (1993), by reason of which the insurer is subject to the Department's regulation. *Id.* at § 624.33. The definition of "life insurance" includes "...the granting of annuity contracts, including, but not limited to, fixed or variable annuity contracts...." *Id.* at § 624.602. Similarly, the definition of "life insurer" means an "insurer writing ... annuity contracts, variable contracts, or any of such types of contracts." *Id.* at § 626.780. An "ordinary-variable contract class insurer" includes the issuance of "annuity contracts providing for payments or values which vary directly according to investment experience." *Id.* at § 626.781. Once a life insurer is granted a certificate of authority, *id.* at § 624.401(1), it may grant annuities. *Id.* at § 624.406(1).

In Florida, no life insurer may deliver or issue an annuity contract except through a Florida licensed insurance agent. *Id.* at § 624.428(1). Florida insurance premium taxes are assessed on annuity premiums. *Id.* at § 624.509(1),(8). When Florida seeks to determine the financial condition of an insurer, it includes as assets its "annuity contracts and accrued interest thereon," *id.* at § 625.012(3)(4); liabilities include unpaid losses and claims on annuity contracts. *Id.* at § 625.041(2). The "Standard Valuation Law" requires that the Department every year value the annuity contracts of "every life insurer doing business in this state...." *Id.* at § 625.121(2). The actuarial analyses required to valuate policies and contracts is complex and varies depending on the date the annuities were issued. *Id.* at § 625.121(5)-(7),(9),(12).

The examinations for a license to be a life insurance agent must cover variable annuities. *Id.* at § 626.241(3). Unfair or deceptive acts or practices in insurance sales were addressed in a comprehensive fashion in 1959 when Florida passed what is

now Part X of Chapter 626, Florida Statutes, the "Unfair Insurance Trade Practices Act." *Id.* at § 626.951(2); ch. 59-205, § 379, Laws of Fla. One provision of the Act addresses problems encountered in Florida when financial institutions market insurance. This "anti-affiliation" statute prohibits financial institutions from engaging in "insurance agency activities."

Florida requires that insurance policies, including annuity contracts, must be filed with the Department for approval. *Id.* at § 627.410. The forms are reviewed for compliance with statutes which either explicitly reference annuity contracts, or include them under the generic statutory definition of life insurance. Annuity forms may be disapproved under this section whenever they contain provisions which are misleading, ambiguous, or whenever the benefits provided under the contract are not reasonable, in accordance with reasonable actuarial techniques, in relation to the premiums. *Id.* at § 627.411. By statute, a number of specific contract provisions must be included in annuity contracts. *Id.* at §§ 627.464-.471.

Insurer solvency is a matter of grave concern to state insurance regulators, and this is particularly so when banking interests seek to market insurance products. Florida has established the Florida Life and Health Insurance Guaranty Association "*to protect* policyowners, insureds, beneficiaries, *annuitants*, payees, *and assignees of* life insurance policies, health insurance policies, *annuity contracts* and supplemental contracts ... *against the failure of an insurer* issuing such policies or contracts ...." *Id.* at §§ 631.712 and .715(1) (emphasis added). The Association maintains three accounts, one being "[t]he annuity account." *Id.* at § 631.715(2)(a)(3).

2. Maryland

Similarly, annuities have been treated as fully regulated insurance products in the State of Maryland. Annuities are defined in Maryland's Insurance Code as "all agreements to make periodical payments where the making or the continuance

of all or some of a series of such payments, or the amount of any such payment, is dependent upon the continuance of human life...." Md. Ann. Code art. 48A, § 65 (1994 Repl. Vol.). As an insurance product, an annuity may only be sold by a licensed insurance agent or broker. *Id.* at §§ 165-67.

The financial condition of all insurers is regulated. *Id.* at § 75, *et. seq.* Indeed, the Maryland Insurance Commissioner annually values the reserve liabilities for all outstanding life insurance policies and annuity business in the state. *Id.* at § 83. In case of insolvency of the insurance company, benefits under annuity contracts are guaranteed by the Life and Health Insurance Guaranty Corporation. *Id.* at § 520, *et. seq. See also Board of Trustees of Md. Teachers & State Employees Supplemental Retirement Plans v. Life & Health Ins. Guaranty Corp.*, 335 Md. 176, 642 A.2d 856 (1994). In addition, a tax is assessed against the insurer on premiums for annuity contracts. *Id.* at § 632.

3. Montana

The Montana State Auditor's Office has comprehensive powers to protect insurance policyholders and consumers and purchasers of variable annuities under the Securities Law of the State of Montana, including: (1) the licensing of insurance agents and insurers, Ch. 17, Title 33, Mont. Code Ann. (MCA), (2) the regulation of the financial condition of insurers to ensure adequate assets, Ch. 2, Title 33 MCA, (3) control of actuarial practices, rates, and contract terms, Chs. 15 and 16, MCA, and (4) regulation of variable annuities under Section 33-10-103(19), MCA. The Montana Auditor's Office licenses more than 650 life and health insurers and has issued over 17,500 licenses to agents. In 1993, it took action in 250 administrative cases involving insurance companies and agents.

The Montana State Auditor's Office presently licenses approximately 20,000 persons as securities brokers, agents, and dealers, some of which are involved in the sale of variable annuities. State regulation attempts to ensure that the consum-

ers of such products are aware of what they are purchasing and can make a reasoned decision. The State Auditor's Office takes approximately 15 administrative actions per year in the securities area.

The Montana State Auditor's Office also assists the Montana Life and Health Insurance Guaranty Association, which stands behind all life insurance and annuity contracts written in the state up to $300,000 of cash benefits for life insurance and $100,000 of annuity benefits. The Association is presently involved in a major case of insolvency in Montana.

Because the Montana State Auditor is the Commissioner of both Insurance and Securities of the State of Montana, he is sensitive to the fact that banks deal mainly with investment risk and some expense risk. Banks are never liable to customers for more than the amount of money they invested plus the interest earned on the money. The sale of annuities requires that premiums and benefits be tied to a policyholder's expected mortality and other risks that are free of regulation. If banks were allowed to market such insurance, serious problems would arise for Montana consumers and would potentially undermine the solvency of banks, the very institutions which, it is argued by petitioners, are supposed to benefit from such a marketing opportunity.

II. THE COMPTROLLER SEEKS TO OVERRIDE STATE REGULATORY POLICIES, WHICH WOULD INJURE CONSUMERS

This Court has insisted that unless Congress specifically states that it intends to supplant state regulatory systems, statutes should not be read to interfere with "the separate spheres of governmental authority preserved in our federalist system." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987) (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981); *see Massachusetts v. Morash*, *supra*, 490 U.S. at 119. The Comptroller, however, seeks to supersede all state regulation of annuities based on a broadly expansive reading of Section 24(7), and an implausibly narrow reading of Section 92. In so doing, the Comptroller would risk exposing consumers to the abuses that have resulted from bank entry into non-bank businesses.

Notably, the Comptroller seeks to incur those risks to vindicate a single "public" policy: to "provide additional income for the banks." Fed. Petitioners' Br. at 11. That is hardly a goal warranting the sacrifice of principles of federalism, consumer protection, and sound statutory construction.

A. The Comptroller Seeks The Total Destruction Of State Regulation

In response to a national bank's proposal to sell annuities, the Comptroller recently announced that his interpretation of Section 24(7) preempts the Connecticut state requirements for the licensing of insurance agents as well as that state's prohibition on bank sales of insurance. OCC Interpretive Letter No. 623, *reprinted in* [1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,505 at 71,612 (May 10, 1993), *appeal pending sub nom. Shawmut Bank Connecticut, N.A. v. Googins*, No. 3:94CV14 (D. Conn.). The Comptroller's attempt to preempt state insurance regulation was upheld in *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24 (E.D. Ky. 1992), *appeals pending* Nos. 92-6300, 92-6331 (6th Cir.), though it was rejected in *Barnett Banks, N.A. v. Gallagher*, 839 F. Supp. 835 (M.D. Fla. 1993), *appeal pending* No. 93-3508 (11th Cir.).

At issue in each of those cases is a state "anti-affiliation" statute, which bars financial institutions from engaging in insurance activity. The Florida state courts have upheld that state's anti-affiliation law because the "Legislature has determined that there is potential for abuse inherent in financial institutions being involved in the sale of insurance." *Production Credit Ass'n of Fla. v. Department of Ins.*, 356 So. 2d 31, 32 (Fla. Dist. Ct. App. 1978). *See also Glastonbury Co. v. Gillies*, 209 Conn.

175, 182, 550 A.2d 8 (1988) (citing legislative history of Connecticut anti-affiliation statute at Conn. Jt. Standing Comm. Hearings, Ins. and Real Estate, 1973 Sess., at 181-85). These potential abuses include "coercion, unfair trade practices, and undue concentration of resources." *Glendale Fed. Sav. & Loan Ass'n v. State Dep't of Ins.*, 587 So. 2d 534, 537 (Fla. Dist. Ct. App. 1991).[4]

These legislative policies were considered by the district court in *Barnett Banks*, which expressed concern that bank insurance activities could imperil insurer solvency and consumer protection. On the solvency issue, the court noted (839 F. Supp. at 842):

> [I]n order [for the bank] to make a profit in automobile loans or home mortgages, the insurance agents may incur business they might otherwise reject because they would be pressured by the bank to do so in order to consummate the bank's loan transactions. This might lead to the over-insurance of risky business, which could result in insolvency of the insurer.

The federal court found the consumer protection threat to be equally clear (*id.*):

> [T]he loan officers could steer customers to the bank's insurance agent for the purpose of suggesting the sale of insurance that is not needed, in order for the bank to make a profit on the insurance policy. The concern herein expressed is that an arms-length relationship be maintained among the bank, the loan officer and the insurance agents. The maintenance of this relationship is for the protection of the solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders.

If the Comptroller prevails in this case and his policy prevails in the preemption cases, the state regulatory protection for

[4] Seventeen states have "anti-affiliation" laws. *See* Appendix A (listing statutes).

consumers and the ability adequately to provide for insurer solvency will be destroyed.

B. Bank Abuses In Selling Non-Bank Products

Experience supports the concern of state legislatures over bank abuses in the sale of non-bank products. Those abuses have been found in bank sales of credit life insurance, annuities, and securities. Indeed, such abuses recently have been alleged concerning the Florida operations of petitioner NationsBank.

Credit life insurance provides the greatest experience with bank sales of non-bank products, and the abuses have been appalling. The 1990 study by the Consumer Federation of America found that credit life insurance is "by far the most overpriced insurance purchased by many consumers." Steven Brobeck, *Credit Life Insurance, supra*, at 1. The study found that banks mislead borrowers about the need for such insurance and coerce them into purchasing it at supracompetitive prices. *Id.* at 3.

The study also found that because banks effectively control the purchasers of credit life insurance (the borrowers), the banks can force "reverse competition" by squeezing insurers to pay ever-higher commissions to the banks. In insurance parlance, the "loss ratio" describes how much of each premium is retained to cover losses by policyholders, with the balance going for commissions and other administrative expenses. Ordinarily, a loss ratio of 75% "allows both insurers and their lender agents to earn a reasonable profit." *Id.* at 2. The Consumer Federation study found, however, that the loss ratio for credit life insurance in Florida was only 37% in 1988, because banks were able to demand such massive commissions, leaving very low reserves to cover the risks. *Id.* Such blatant gouging by banks undermines the solvency of insurers, thereby placing consumers' coverage at risk.

Our experience in Florida is consistent with that study. The price of credit life insurance has risen steadily; the loss ratios have shifted profoundly in the banks' favor and thereby have

undermined insurer solvency; and many consumers have reported coercive sales tactics by banks.

The problem of bank coercion of customers also has arisen in a major Florida bank's sales of annuities under a "lobby-lease" arrangement.[5] Bank employees were paid a "bounty" of at least $5.00 for every bank customer who made an appointment with the insurance agent, who was deceptively titled a Tax Advantage Account Specialist. The agency sold annuities that were structured so the purchaser did not actually acquire the annuity that he or she thought was being purchased; rather, the consumer bought only an interest in a trust managed by the bank, which then bought annuities payable to the trust. The bank received one-third of the insurance commission, plus fees for managing the trust, and was liable only for gross negligence. *Department of Insurance and Treasurer v. James Mitchell and Company, et al.,* No. 93-2442 (Fla. Div. of Admin. Hearings, Aug. 30, 1994) (Recommended Order) (detailing "deceptive and misleading" marketing program).

A further consumer protection issue is the erroneous belief of many consumers that annuities purchased at banks are federally-insured. A recent survey sponsored by the American Association of Retired Persons found that out of 445 individuals whose banks sold annuities, 40% thought the annuities were federally insured, and 46% did not know whether they were or not. AARP, *Bank Investment Products Survey* 9-10 (Jan. 1994). This widespread misunderstanding is, in our experience, often encouraged by the bank in a lobby-lease situation, and causes consumers to misunderstand the risks associated with the products they are purchasing.

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[5] Under a "lobby-lease" arrangement, the bank rents space in its lobby to an insurance agency, which is supposed to offer insurance products on a completely independent basis. The arrangement is legal in Florida so long as the insurance operation is conducted independently of the bank. We have found, however, that the banks often blur the line between bank and insurance agency, and many consumers believe they are buying insurance from the bank.

Finally, several complaints filed this summer include allegations concerning NationsBank which are consistent with these experiences. *See NationsBank Accused of Deceptive Tactics*, Wash. Post, B1-B2 (July 29, 1994) (Appendix B); *NationsBank Under Fire for Alleged Staff Bonuses On Brokerage Referrals*, American Banker, 1, 8 (Aug. 3, 1994) (Appendix C). According to an administrative complaint filed by three former NationsBank brokers, (i) bank employees received cash bonuses for "steering" bank customers to the higher-risk brokerage department, (ii) bank customers were discouraged from investing in insured certificates of deposit, but were not told that certain recommended securities were not insured, (iii) bank employees "routinely" gave the brokers confidential information about the customers' accounts, and (iv) the bank intentionally blurred the distinction between the bank and the brokerage operation. App. B. Another report stated that NationsBank tellers received a 5 percent commission on all purchases of securities by customers they referred, a policy that was replaced by a $10.00 "bounty" for referrals resulting in sales. App. C.

All of these factors demonstrate the wisdom of preserving state regulation of insurance products (*e.g.*, Appendix D) against the Comptroller's assault. Indeed, the Comptroller's assertion that bank sales of annuities create no solvency issues for banks (NationsBank Pet. App. at 47a-48a) has a harsh irony for state insurance regulators. Solvency issues will not be raised for the banks, but will arise for the insurers and insurance regulators who must cope with the banks' market power. If national banks are permitted to sell annuities to their captive customers, the banks will quickly have sufficient market power to force insurers to offer riskier products with greater commissions for banks.[6] This Court should not embrace such a negative policy outcome based on petitioners' novel and unsupported statutory constructions.

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[6] This risk is not theoretical since two major annuity underwriters failed in the early 1980s (Baldwin-United and Charter Security Life), while three other insurers (First Executive, First Capital Holding and Guarantee Security Life) failed in recent years.

CONCLUSION

For all of the foregoing reasons, and the reasons included in the Brief of Respondent, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

State Anti-Affiliation Statutes

Alaska	Alaska Banking Code tit. 6, § 06.05.272 (1993)
Ark.	Ark. Code Ann. § 23-64-203(b) (1987)
Colo.	Colo. Rev. Sat. Ann. § 10-2-221(2) (West 1994)
Conn.	Conn. Gen. Stat. Ann. § 38a-775 (West 1994)
Fla.	Fla. Stat. Ann. § 626.988 (West 1994)
GA	Ga. Code Ann. § 33-3-23 (1993)
IL	Ill. Ann. Stat. ch. 215, para. 499.1(e) (Smith-Hurd 1994)
LA	La. Rev. Stat. Ann. tit. 6, § 121-B(2) (West 1994)
ME	Rev. Stat. Ann. tit. 24-A § 1514-A (West 1993)
MA	Mass. Gen. Laws Ann. ch. 175, § 174(E) (West 1994)
MI	Mich. Comp. Laws Ann. §§ 500.1242, .1207(3), .1207(5), .2077(a) (West 1994)
NM	N.M. Stat. Ann. § 59A-12-10 (1993)
NY	N.Y. Insurance Law § 2501 (McKinney 1994)
Ohio	Ohio Rev. Code Ann. § 3911.01 (Anderson 1993)
PA	Pa. Stat. Ann. tit. 40, § 281(b) (1994)
R.I.	R.I. Gen. Laws § 27-3-46 (1993)
VT	Vt. Stat. Ann. tit. 8, § 4811(a)

APPENDIX B

"NationsBank Accused of Deceptive Tactics-Former Brokers Cite Securities Sales Practices" (The Washington Post - July 29, 1994)

NEW YORK, July 28 - Three former NationsBank brokers are accusing the bank of deceptive sales practices that steered bank customers to its brokerage department, discouraged savers from investing in insured deposits and routinely gave confidential bank customer information to its brokers in order to solicit them to buy securities.

The claim, filed today with the National Association of Securities Dealers (NASD), comes as more and more commercial banks enter the securities business. Legislators and regulators have expressed concern that many bank customers fail to understand the greater risks of brokerage purchases compared with bank deposits.

Ellison Clary, a spokesman for NationsBank Corp. and its brokerage unit, NationsSecurities, said, "We vigorously deny the claims and feel that they are unfounded. We think the procedures we have in place conform not only to the letter of the securities and banking laws but also with the spirit of disclosure and fair dealing that is inherent in those laws."

He said that this is the first time such allegations have been made against the bank, but he would not respond to the specific claims.

The former employees, who worked out of three different Florida branches of the bank, say that they were fired or quit last month after witnessing the sales practices at NationsBank's brokerage subsidiary.

Charlotte, N.C.-based NationsBank, the biggest bank company operating in the Washington area, offers brokerage services in 77 of its 386 branches in Maryland, the District and Northern Virginia.

"I could no longer sell investment products that I didn't think were good for the clients," said Catherine B. Hovis, one of the three former employees, in an interview. She resigned last month as a NationsBank broker in Palmetto, Fla. "There was a total lack of supervision. Second, it was an operational nightmare. All I am doing is protecting my good name and everything I have worked for."

Clary said Hovis's accusations were "groundless."

Banks often sell mutual funds and securities in branches that bear the seal of the Federal Deposit Insurance Corp., which can lead customers to false assumption that the securities are FDIC-insured or protected against loss. A recent study by the Securities and Exchange Commission concluded that 60 percent of people who buy mutual funds from banks think their investment is safeguarded by the FDIC.

In order to offer brokerage services, NationsBank agreed last year to certain conditions set by the Office of the Comptroller of the Currency, which regulates federally chartered banks, that require the bank to separate the brokerage operation.

A senior attorney at the OCC said the case is unusual and that bank-brokerage complaints have not been widespread.

NationsBank and OCC spokesmen say that they are discussing the former employees' allegations. If warranted, the OCC could initiate a formal legal action that could lead to revocation of its approval of NationsBank's brokerage operation.

The NASD, which regulates the practices of brokers, could refer the complaint to its enforcement division as part of an arbitration hearing. The NASD can fine a company and bar or suspend individuals or firms from the business.

The brokers are seeking millions of dollars in damages for being forced out of their jobs after complaining about the practices. The allegations surfaced last month when one of the three former brokers filed a lawsuit against the bank for wrongful dismissal.

The former brokers claim that NationsBank:

- Did not tell customers that bank employees were given special cash bonuses for "steering" bank customers to the brokerage department.
- Discouraged bank customers from investing in "CDs, savings accounts and other similar investment at NationsBank, which would have been insured against loss of principal" by the FDIC or the bank. Instead, customers were advised to invest in products sold by the brokerage unit. They were not told "that these products were actually uninsured securities."
- "Routinely" gave to its brokers confidential bank customer account information that was used "to solicit NationsBank bank customers to purchase securities ... Such confidential information was disclosed without the knowledge or permission" of the bank's customers.
- Intentionally blurred the distinction between the bank and the brokerage. Brokers were based in the bank's branches and "were permitted virtually unrestricted access ... so that their activities appeared (and were) completely integrated with the operations of the bank." This "created substantial customer confusion" that made it easier to sell securities to bank customers.
- Misled customers by "using names and color schemes which were confusingly similar to the name and the distinctive color scheme [red, white and blue] of the bank." The result was that "customers thereby were led to believe

that the investments purchased were guaranteed by or protected by NationsBank or by the FDIC."

The complaint says, "These practices cannot be blamed on one or two rogue individuals, but were and are systemic practices of ... NationsBank so as to unlawfully utilize securities professionals as mere conduits to trick risk-averse bank customers."

APPENDIX C

"NationsBank Faces Heat on Referrals To Brokerage-Branch Staff Allegedly Got Improper Bonuses" (American Banker - August 3, 1994)

NationsBank Corp. has come under fire for an alleged practice, said to have been abandoned in January, of paying hefty cash bonuses to branch employees who referred business to its brokerage affiliate.

Two pending lawsuits charge that the North Carolina-based company violated banking and securities rules by paying a 5% share of brokerage commissions to branch employees.

The practice was confirmed by a current employee of the brokerage affiliate, NationsSecurities, who asked not to be named. The company is a joint venture of NationsBank's lead banking unit and Dean Witter, Discover & Co.

A NationsBank spokesman declined to comment on the incentives, which were disclosed in an arbitration claim filed against NationsSecurities last month by 18 brokers.

Similar disclosures also were made in a separate suit by three other brokers.

But the spokesman, Ellison Clary, reiterated statements the bank has made over the past month that NationsSecurities abides by both "the spirit and the letter" of baking and securities regulations.

The statements came in response to suits by a handful of former brokers and customers claiming that NationsSecurities is systematically misleading customers about investments.

Several brokers not involved in the suits have taken exception to the claim that customers are misled, as has the bank, which vigorously denies the charge.

But the brokers were in consensus in describing the incentive program. If it existed, it would appear to belie the claim that NationsSecurities was in full compliance with the rules.

"Banks in general are being very careful not to cross any lines," said Glen Casey, a consultant with Cerulli Associates in Boston, which advises banks about marketing investments.

"This case with Nations is a bit surprising if, in fact, the allegations are true."

According to the arbitration claim for the 18 brokers, NationsBank had adopted the commission-sharing arrangement before the formation of NationsSecurities in 1992.

In the program, tellers and customer service reps were taught to identify and refer prospects to branch-based brokers. The suit said that one unnamed branch employee in Texas got a $3,000 bonus for a referral that resulted in a $1.5 million investment. Another branch employee was said to have gotten more than $2,000 from a referral that resulted in a $1 million transaction.

In January, the bank changed the payout to a flat $10 fee for referrals that led to sales.

Since last year, federal banking guidelines have barred banks from paying branch employees bonuses that are contingent upon the sales of investments.

Instead, bonuses can be paid only for referrals, whether or not a sale is made. These rules are intended to help separate a bank's traditional business from its brokerage business. They are also meant to keep unqualified people from selling investments. Likewise, the National Association of Securities Dealers prohibits brokers from splitting commissions with people who don't have securities licenses. So do rules in some states in which NationsBank operates, including Florida, Georgia, North Carolina, and Virginia, according to the arbitration claim.

The suit said that NationsBank alluded to these concerns in a memo it distributed that listed two reasons for dropping the arrangement.

One was that the plan didn't compensate employees for meeting "sales objectives."

The other was that "OCC and NASD regulations" say such incentives must "be normal and have no bearing on commissions generated."

Robert F. Miailovich, a senior regulator at the Federal Deposit Insurance Corp., said that if a bank was sharing commissions, regulators would likely ask it to change the practice. If the bank changed, it would likely face no further sanctions.

He could not say if any such discussions had been held with NationsBank. A Securities and Exchange Commission official who wished not to be identified said banks are excluded from the commission-sharing restrictions in the securities dealers group's rules.

APPENDIX D

CHAPTER 4-150
LIFE AND HEALTH ADVERTISING REQUIREMENTS

* * *

PART II ADVERTISING OF LIFE INSURANCE AND ANNUITY CONTRACTS

4-150.101 Purpose.

4-150.102 Applicability.

4-150.103 Definitions.

4-150.104 Method of Disclosure of Required Information.

4-150.105 Form and Content of Advertisements.

4-150.106 Disclosure Requirements for Annuity Contract Advertisements.

4-150.107 Advertisements of Proceeds Payable, Premiums Payable, or Limited, Graded, or Modified Features.

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4-150.109 Use of Dividends.

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4-150.111 Use of Statistics.

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4-150.113 Jurisdictional Licensing and Status of Insurer.

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4-150.117 Statements about an Insurer.
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4-150.119 Enforcement Procedures.
4-150.120 Filing for Review.
4-150.121 Severability Provision.
4-150.122 Prior Rules.

* * *

PART II ADVERTISING OF LIFE INSURANCE AND ANNUITY CONTRACTS

4-150.101 Purpose. The purpose of these rules is to provide prospective purchasers with clear and unambiguous statements in the advertisement of Life Insurance and Annuity Contracts, and to assure the clear, truthful and adequate disclosure of the benefits, limitations and exclusions of policies sold as Life Insurance and Annuity Contracts. This purpose is intended to be accomplished by the establishment of guidelines and standards of permissible and impermissible conduct in the advertising of Life Insurance and Annuity Contracts to assure that product descriptions are presented in a manner which prevents unfair, deceptive and misleading advertising and is conducive to accurate presentation and description of Life Insurance and Annuity Contracts to the segment of the insurance buying public through the advertising media and material used by insurance agents and companies.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641 FS. History-New 9-1-73, Formerly 4-35.01, Amended 6-12-88, Formerly 4-35.001.

4-150.102 Applicability.

(1) These rules shall apply to any Life Insurance Policy and Annuity Contract "advertisement," disseminated in this State which the insurer knows or reasonably should know is intended for presentation, distribution or dissemination in this State, when such presentation, distribution or dissemination is made either directly by an insurer or indirectly on behalf of an insurer, by an agent, broker, producer or solicitor or any other person who has either actual or apparent authority to act on behalf of the insurer; provided the insurer shall not be responsible for advertisements that are published in violation of written procedures or guidelines of the insurer. Further, provided, that in variable contracts where disclosure requirements are established pursuant to Federal regulation, these rules shall be interpreted so as to minimize or eliminate conflict with such Federal Regulation wherever possible.

(2) Every insurer shall establish and at all times maintain a system of control over the content, form and method of dissemination of all its Life Insurance and Annuity Contract advertisements. All such advertisements, regardless of by whom written, created, designed or presented, shall be the responsibility of the insurer(s) benefiting directly or indirectly from their dissemination; provided the insurer shall not be responsible for advertisements that are published in violation of written procedures or guidelines of the insurer.

(3) Advertising materials which are reproduced in quantity shall be identified by form numbers or other identifying means. Such identification shall be sufficient to distinguish an advertisement from any other advertising materials, policies, applications or other materials used by the insurer.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.02, Amended 6-12-88, Formerly 4-35.002.

4-150.103 Definitions. For the purpose of these rules, the terms below are defined as follows:

(1) An "Advertisement" includes:

(a) printed and published material, audio visual material and descriptive literature used by or on behalf of an insurer in direct mail, domestic or regional publications which are distributed for viewing in Florida (i.e. newspapers, magazines, radio scripts or TV scripts), billboards and similar displays; and

(b) descriptive literature and sales aids of all kinds issued by an insurer, agent, producer, broker, or solicitor or any other person who has either actual or apparent authority to act on behalf of the insurer for presentation to members of the insurance buying public, including but not limited to, circulars, leaflets, booklets, depictions, illustrations, form letters, and lead-generating devices as herein defined; and

(c) prepared sales talks, presentations and material for use by agents, brokers, producers and solicitors, announcers, spokespersons, celebrities, and other persons, whether prepared by the insurer or the agent, broker, producer, or solicitor, announcer, celebrity, or any other person who has either actual or apparent authority to act on behalf of the insurer; and

(d) advertising material included with a policy when the policy is delivered and material used in the solicitation of any policy.

(2) The definition of "Advertisement" does not include:

(a) material to be used solely for the training and education of an insurer's employees, agents, or brokers;

(b) material used exclusively in-house by insurers;

(c) communications within an insurer's own organization not intended for dissemination to the public;

(d) individual communications of a personal nature with current policyholders regarding existing coverage other than

material urging such policyholders to renew, increase or expand coverages;

(e) correspondence between a prospective group policyholder and an insurer in the course of negotiating a group contract;

(f) court approved material ordered by a court to be disseminated to policyholders; or

(g) a general announcement from a group policyholder to eligible individuals on an employment or membership list which may include a brief description of coverage and is primarily a notification that a contract or program has been written or arranged; provided, the announcement must clearly indicate that it is preliminary to the issuance of a booklet, pamphlet, brochure or other similar paper preliminary to coverage by the insurer.

(3) "Application" means the form which must be filled in by the person seeking to effectuate an insurance policy.

(4) "Application Period" also includes any enrollment period.

(5) "Certificate" means any certificate issued under a group Life Insurance and Annuity Contract which certificate has been delivered or issued for delivery in this State.

(6) "Exception" means any provision in a policy whereby coverage for a specified hazard is entirely eliminated; it is a statement of a risk not assumed under the policy.

(7) "Institutional Advertisement" means an advertisement having as its sole purpose the promotion of the readers', viewers' or listeners' interest in the concept of Life Insurance and Annuity Contracts or the promotion of the insurer as a seller of Life Insurance and Annuity Contracts.

(8) "Insurer" includes any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds,

fraternal benefit society, and any other legal entity which is defined as an "insurer" in the Insurance Code of this State.

(9) "Invitation to Contract" means an advertisement which is neither an institutional advertisement nor an invitation to inquire.

(10) "Invitation to Inquire" means an advertisement having as its objective the creation of a desire to inquire further about life insurance and annuity contracts, which advertisement is limited to a brief description of coverage and which shall contain a provision in the following or substantially similar form:

This policy has (exclusions) (limitations) (reductions of benefits) (terms under which the policy may be continued in force or discontinued). For costs and complete details of the coverage call (or write) your insurance agent or the company. [whichever is applicable].

A "brief description of coverage" in an invitation to inquire must be limited to a brief description of the loss for which benefits are payable but may contain the dollar amount of benefits payable, and/or the period of time during which benefits are payable. An invitation to inquire may not refer to cost or rates. As with all life insurance and annuity contract advertisements, an invitation to inquire may not:

(a) employ devices which are designed to create undue anxiety;

(b) exaggerate the value of the benefits available under the advertised policy;

(c) otherwise violate the provisions of these rules.

(11) "Lead Generating Device" means any communication directed to the public which, regardless of form, content, or stated purpose, invites or elicits a response on the subject of insurance and thereby results in the compilation or qualification of a list containing names of or other personal information

regarding persons who have expressed a specific interest in an insurance product or coverage and which is to be used to solicit residents of this State for the purchase of Life Insurance and Annuity Contracts or other insurance.

(12) "Life insurance policy and annuity contract" includes any policy, plan, certificate, contract, agreement, statement of coverage, rider or endorsement which provides for life insurance or annuity contract benefits, or a combination thereof.

(13) "Limitation" means any provision which restricts coverage under the policy other than an exception or a reduction.

(14) "Person" means any natural person, association, organization, partnership, trust, group, discretionary group, corporation or any other entity.

(15) "Reduction" means any provision which reduces the amount of the benefit; this term includes a situation where a risk of loss is assumed, but payment upon the occurrence of such loss is limited to some amount or period less than would be otherwise payable had such reduction not been used.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.03, Amended 6-12-88, 2-26-92, Formerly 4-35.003.

4-150.104 Method of Disclosure of Required Information. All information required to be disclosed by these rules shall be set out conspicuously, in the same type size as that used in the body of the advertisement, and in close conjunction with the statements to which such information relates, or under appropriate captions of such prominence that it shall not be minimized, rendered obscure or presented in an ambiguous fashion, or intermingled with the context of the advertisement so as to be confusing or misleading.

Specific Authority 624.308 FS. Law Implemented 626.9541(1) FS. History-New 9-1-73, Formerly 4-35.04, Amended 2-26-92, Formerly 4-35.004.

4-150.105 Form and Content of Advertisements.

(1) The form and content of a Life Insurance and Annuity Contracts advertisement shall be sufficiently complete and clear to avoid deception or the capacity or tendency to mislead or deceive. Whether an advertisement has a capacity or tendency to mislead or deceive shall be determined by the Commissioner of Insurance from the overall impression that the advertisement may be reasonably expected to create upon a person of average education or intelligence, within the segment of the public to which it is directed.

(2) Advertisements shall be truthful and not misleading in fact or in implication. Words or phrases, whose meanings are clear only by implication or by the consumer's familiarity with insurance terminology, shall not be used.

(3) An insurer must clearly identify its Life Insurance and Annuity Contract as an insurance policy. With respect to any product first filed to be offered to Florida residents on or after the effective date of these rules, a policy trade name must be followed by the words "Insurance Policy" or similar words clearly identifying the fact that an insurance policy is being offered.

(4) No insurer, agent, broker, producer, solicitor or other person shall solicit a resident of this State for the purchase of Life Insurance and Annuity Contracts in connection with or as the result of the use of any advertisement which:

(a) Contains any misleading representations, misrepresentations, or is otherwise untrue, deceptive or misleading with regard to the information imparted, the status, character or representative capacity of such person or the true purpose of the advertisement; or

(b) Otherwise violates the provisions of these rules; or

(c) Otherwise violates the provisions of the Florida Insurance Code.

(5) No insurer, agent, broker, producer, solicitor or other person shall solicit residents of this State for the purchase of Life Insurance and Annuity Contracts through the use of a true or fictitious name which is deceptive or misleading with regard to the status, character, or proprietary or representative capacity of such person or the true purpose of the advertisement.

(6) No insurer, agent, broker, producer, solicitor, or other person shall use a lead generating device or list of prospective insurers compiled therefrom, if the insurer, agent, broker, producer, solicitor or other person knew or reasonably should have known that the lead generating device or list of prospective members was obtained in a manner which violates any provision of the Florida Insurance Code or otherwise violates the provisions of these Rules. No list of prospective insureds may be purchased unless the purchaser requests from the seller any lead generating devices that were used to compile the list and obtains a specimen copy of any such devices that are disclosed.

(7) The contents of all advertisements, lead generating devices, and lists of prospective insureds, regardless of by whom prepared, created, designed or presented, shall be the responsibility of the insurers benefiting directly or indirectly from its use, if the insurer either requested the preparation of, or reasonably should have known of the content of the advertisement lead generating device or list of prospective insureds.

(8) Each solicitation of coverage which insures a Florida resident shall be from and contain the name of a Florida licensed agent.

(9) No insurer, agent, broker, producer, solicitor or other person shall effectuate insurance coverage prior to a full expla-

nation of the coverage offered and completion of an application form.

(10) A lead generating device conducted on behalf of an insurer or agent shall contain the name of the insurer or agent benefiting directly or indirectly from its use.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 624.428, 626.112, 626.784, 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.05, Amended 6-12-88, 2-26-92, Formerly 4-35.005.

4-150.106 Disclosure Requirements for Annuity Contract Advertisements. In addition to the requirements of 4-150.104 and 4-150.105, advertisements of annuity contracts shall be subject to the following requirements:

(1) Advertisements of annuities containing a rate to be earned, including but not limited to interest rates or rates of return, are prohibited unless all limitations and conditions which affect the ultimate rate of return earned by the policyholder/annuitant are disclosed prominently and conspicuously with equal emphasis to describe the interest rate or rate of return. The disclosure shall include:

(a) premium expense charges, if any;

(b) administrative charges, if any;

(c) the full surrender charge, year by year; and

(d) any policy fees.

(2) Advertisements of two-tier annuities shall disclose:

(a) the interest rate on annuity accumulation fund;

(b) the interest rate for cash value accumulation fund; and

(c) the planned interest rate that will apply on the maturity date of annuitization.

(3) An annuity advertisement shall not refer to an annuity as a CD annuity, or in any terms that would lead a prospective

purchaser to believe it is a negotiable instrument or anything other than an annuity issued by a life insurance company.

Specific Authority 624.308, 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (l), 626.9641(1) FS. History-New 2-26-92, Formerly 4-35.0051.

(a) No advertisement shall omit information or use words, phrases, statements, references or illustrations if such omission or such use has the capacity, tendency or effect of misleading or deceiving purchasers or prospective purchasers as to the nature or extent of any policy or contract benefit payable, loss covered or premium payable

4-150.107 Advertisements of Proceeds Payable, Premiums Payable, or Limited, Graded, or Modified Features

(1) Deceptive Words, Phrases, or Illustrations Prohibited

(a) No advertisement shall omit information or use words, phrases, statements, references or illustrations if such omission or such use has the capacity, tendency or effect of misleading or deceiving purchasers or prospective purchasers as to the nature or extent of any policy or contract benefit payable, loss covered or premium payable. The fact that the policy or contract offered is made available to a prospective insured for inspection prior to consummation of the sale or an offer is made to refund the premium if the purchaser is not satisfied, does not remedy misleading statements.

(b) Invitations to contract must clearly reflect the insurer, the agent, the policy form number(s), the type plan, premium payable, payment period, and if applicable, changes in face amounts and premiums.

(c) A simultaneous disclosure of the plan of insurance being offered shall be made in close proximity to the advertised face and premium amounts.

(d) An advertisement of life insurance sold by direct response shall not contain the phrase "no salesman will call," or "no agent will call," or "by eliminating the agent and/or commission we can offer this low cost plan," or similar wording in a misleading manner.

(e) Full benefit policies or contracts may use the term "non-medical" or "no medical examination required" or similar terms where issue is not guaranteed, but this statement shall be accompanied by a further disclosure that health questions are required and that issuance of the policy or contract may depend upon evidence of insurability.

(f) A full explanation must be made of the use of units in which a common premium is specified and varying face amounts according to age are described.

(g) An advertisement which is an invitation to contract shall disclose those limitations affecting the basic provisions of the policy.

(h) An advertisement which also is an invitation to join an association, trust, or discretionary group may solicit insurance coverage on aseparate and distinct application which requires separate signatures for each application. The insurance program must be presented so as not to mislead or deceive the prospective members regarding the fact that they are purchasing insurance as well as applying for membership, if that is the case.

(2) Limited, Graded or Modified Features.

(a) An advertisement for a policy or contract containing graded, modified or other limiting benefits shall fairly and accurately describe such negative features.

(b) If an insurer fails to require evidence of insurability as a condition for issuance of a policy or contract with graded, modified, or other limiting benefits an advertisement of such policy or contract shall not state or imply that the applicant's physical condition or medical history will not affect the issuance

of the policy or contract or payment of a claim thereunder. This rule prohibits the use of the phrases, "no medical examination required," "no health questions asked," and phrases of a similar import in a misleading manner, but does not prohibit explaining "guarantee issue" as long as it is done contiguous to and in a manner as prominent as the term being defined.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.06, Amended 6-12-88, 2-26-92, Formerly 4-35.006.

4-150.108 Necessity for Disclosing Policy Provisions Relating to Renewability, Cancellability, and Termination. An advertisement which is an invitation to contract shall disclose the provisions relating to renewability, cancellability, and termination and any modification of benefits, losses covered or premiums because of age or for other reasons, in a manner which shall not minimize or render obscure the qualifying conditions.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 6-12-88, Formerly 4-35.0061.

4-150.109 Use of Dividends.

(1) An advertisement shall not be used that utilizes or describes dividends in a manner which is misleading or has a tendency to mislead.

(2) An advertisement shall not directly or indirectly state or imply that the amount of dividends or divisible surplus is guaranteed; nor shall such advertisement state or imply that a policyholder will profit by the growth of the company.

(3) Any comparison between participating and non-participating policies or contracts must be true and accurate.

Specific Authority 624.308 FS. Law Implemented 626.9541(1), (2) FS. History-New 9-1-73, Formerly 4-35.07, 4-

35.007.

4-150.110 Testimonials or Endorsements by Third Parties.

(1) Testimonials and endorsements used in advertisements must be genuine, represent the current opinion of the author, be applicable to the policy advertised and be accurately reproduced. The insurer, in using a testimonial or endorsement, makes as its own all of the statements contained therein, and the advertisement, including such statements, is subject to all the provisions of these rules. When a testimonial or endorsement is used more than one year after it was originally given, a confirmation must be obtained.

(2) A person shall be deemed a "spokesperson" if the person making a testimonial, or endorsement:

(a) Has a financial interest in the insurer or a related entity as a stockholder, director, officer, employee, or otherwise; or

(b) Is an entity formed by the insurer, is owned or controlled by the insurer, its employees, or the person or persons who own or control the insurer; or

(c) Is in a policy-making position who is affiliated with the insurer in any of the above described capacities; or

(d) Is in any way directly or indirectly compensated for making a testimonial or endorsement.

(3) Any person acting as a spokesperson, as defined in the preceding paragraph, who performs any of the following acts in an advertisement shall be considered soliciting an insurance product, and such person shall be a licensed insurance agent pursuant to the Florida Insurance Code:

(a) Solicits insurance or procures applications; or

(b) Engages or holds himself out as engaging in the business of analyzing or abstracting insurance policies; or

(c) Engages in counseling, advising, or giving opinions to persons relative to insurance contracts; or

(d) Performs an invitation to contract, except where performed by a company officer in a manner which does not violate Section 626.112(4), Florida Statutes.

(4) The fact of a financial interest or the proprietary or representative capacity of a spokesperson shall be disclosed in an advertisement and shall be accomplished in the introductory portion of the testimonial or endorsement in the same form and with equal prominence thereto. If a spokesperson is directly or indirectly compensated for making a testimonial, endorsement or appraisal, such fact shall be disclosed by use of the phrase "Paid Endorsement" or words of similar import in a type style and size that is at least equal to that used for the spokesperson's name or the body of the testimonial or endorsement, whichever is larger. In the case of television or radio advertising, the required disclosure must be accomplished in the introductory portion of the advertisement and must be given prominence, and if printed must be presented in a type style and size that is at least equal to the largest type otherwise used in the advertisement. The use of the phrase "Paid Endorsement" is not required where the spokesperson is a company officer who is paid generally but not specifically for making the advertisement.

(5) The disclosure requirements of this rule shall not apply where the sole financial interest or compensation of a spokesperson, for all testimonials or endorsements made on behalf of the insurer, consists of the payment of union "scale" wages required by union rules, and if the payment is actually for such "scale" for TV or radio performances.

(6) An advertisement shall not state or imply that an insurer or a policy or contract has been approved or endorsed by any individual, group of individuals, society, association, organization, governmental agency or other entity, unless such is the fact, and unless any proprietary relationship between an organization

and the insurer is disclosed. If the entity making the endorsement or testimonial has been formed by the insurer or is owned or controlled by the insurer, or the person or persons who own or control the insurer, such fact shall be disclosed in the advertisement. If the insurer or an officer of the insurer formed or controls the association, or holds any policy-making position in the association, that fact must be disclosed.

(7) When a testimonial refers to benefits received under a policy for a specific claim, the claim data, including claim number, date of loss, and other pertinent information shall be retained by the insurer for inspection for a period of four years or until the filing of the next regular report of examination of the insurer, whichever is the longer period of time. The use of testimonials which do not correctly reflect the present practices of the insurer or which are not applicable to the policy or benefits being advertised is not permissible.

(8) The provisions of subsections (2), (3) and (4) of this section shall not apply to a written endorsement which does not describe specific benefits, coverages or premiums and which is made by an association of individuals which:

(a) has been in existence for more than one year prior to making the written endorsement; and

(b) is formed for purposes other than soliciting insurance; and

(c) has a valid and bona fide governing constitution and by-laws; and

(d) has as its principal purpose some goal or objective other than providing or soliciting insurance,

as determined by the Insurance Commissioner in accordance with the procedures and requirements of Chapter 120, Florida Statutes, the Administrative Procedure Act.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.051, 626.784, 626.9541(1)(a), (b), (e), (k), (l),

626.9641(1) FS. History-New 9-1-73, Formerly 4-35.08, Amended 6-12-88, Formerly 4-35.008.

4-150.111 Use of Statistics.

(1) An advertisement relating to the dollar amounts of claims paid, the number of persons insured, total amount of insurance in force, relative standing, or similar statistical information relating to any insurer or policy or contract shall not use irrelevant facts, and shall not be used unless it accurately reflects all of the relevant facts. Such an advertisement shall not imply that such statistics are derived from the policy or contract advertised unless such is the fact, and when applicable to other policies or contracts or plans shall specifically so state.

(a) An advertisement shall specifically identify the policy to which statistics relate and, where statistics are given which are applicable to a different policy, it must be stated clearly that the data do not relate to the policy being advertised.

(b) An advertisement shall not contain statements which are untrue in fact, or by implication misleading with respect to the assets, corporate structure, financial standing, age or relative position of the insurer in the insurance business.

(2) An advertisement shall not represent or imply that claim settlements by the insurer are "liberal" or "generous", or use words of similar import, or state or imply that claim settlements are or will be beyond the actual terms of the contract. An unusual amount paid for a unique claim for the policy advertised is misleading and shall not be used.

(3) The source of any statistics used in an advertisement shall be identified in such advertisement.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.09, Amended 6-12-88, Formerly 4-35.009.

4-150.112 Disparaging Comparisons and Statements.

(1) An advertisement shall not directly or indirectly make unfair or incomplete comparisons of policies or contracts or benefits or comparisons of non-comparable policies or contracts of other insurers, and shall not disparage competitors, their policies or contracts, services or business methods, and shall not disparage or unfairly minimize competing methods of marketing insurance.

(2) An advertisement should not contain statements such as "no red tape" or "here is all you do to receive benefits."

(3) Advertisements which state or imply that competing insurance coverages customarily contain certain exceptions, reductions or limitations not contained in the advertised policies are unacceptable unless such exceptions, reductions or limitations are contained in a substantial majority of such competing coverage.

(4) Advertisements which state or imply in a misleading or incomplete manner that an insurer's premiums are lower or that its loss ratios are higher because its organizational structure differs from that of competing insurers shall not be used.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.10, Amended 6-12-88, Formerly 4-35.010.

4-150.113 Jurisdictional Licensing and Status of Insurer.

(1) An advertisement which is intended to be seen or heard beyond the limits of the jurisdiction in which the insurer is licensed shall not imply licensing beyond those limits.

(2) An advertisement shall not create the impression directly or indirectly that the insurer, its financial condition or status, or the payment of its claims, or the merits, desirability, or advisability of its policy or contract forms or kinds of plans

of insurance are approved, endorsed, or accredited by any division or agency of this State or the United States Government or if such relationship exists, such advertisement shall not exaggerate or otherwise be misleading with respect to the nature or extent of such relationship. This shall not include those cases where permission is necessary to transact insurance within military installations.

(3) An advertisement shall not imply in a misleading manner that approval, endorsement, or accreditation of policy forms or advertising has been granted by any division or agency of the state or federal government. "Approval" of either policy forms or advertising shall not be used by an insurer to imply or state that a governmental agency has endorsed or recommended the insurer, its policies, advertising or its financial conditions.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.11, Amended 6-12-88, Formerly 4-35.011.

4-150.114 Identity of Insurer.

(1) The name of the actual insurer shall be stated in all of its advertisements. The form number or numbers of the policy advertised shall be stated in any invitation to contract. An advertisement shall not use a trade name, any insurance group designation, name of the parent company of the insurer, name of a particular division of the insurer, service mark, slogan, symbol or other device which would have the capacity or tendency to mislead or deceive as to the true identity of the insurer or create the impression that the parent company would have any responsibility for the financial obligation of the Insurance Company.

(2) No advertisement shall use any combination of words, symbols, or physical materials which by their content, phraseology, shape, color or other characteristics, are so similar to

combination of words, symbols, or physical materials used by agencies of the federal government or of this State, or otherwise appear to be of such a nature that it tends to confuse or mislead prospective insureds into believing that the solicitation is in some manner connected with an agency of the municipal, county, state, or federal government, or if such relationship exists, such advertisement shall not exaggerate or otherwise mislead with respect to the nature or extent of such relationship.

(3) Advertisements, envelopes, or stationery which utilize words, letters, initials, symbols, or other devices which are so similar to those used by governmental agencies or other insurers are not permitted if they may tend to mislead or confuse the public into believing:

(a) that the advertised coverages are somehow provided by or are endorsed by such governmental agencies or such other insurers; or

(b) that the advertiser is the same as, is connected with, or is endorsed by such governmental agencies or such other insurers.

(4) No advertisement shall use the name of a state or a political subdivision thereof in a policy name or description.

(5) No advertisement in the form of envelopes or stationery of any kind may use any name, service mark, slogan, symbol, or any device in such a manner that implies that the insurer or the policy advertised, or that any agent who may call upon the consumer as a result of the advertisement is connected with a governmental agency.

(6) The use of letters, initials, or symbols of the corporate name or a trademark that would have the tendency or capacity to mislead or deceive the public as to the true identity of the insurer is prohibited unless the true, correct and complete name of the insurer is in close conjunction and in the same size type

as the letters, initials, or symbols of the corporate name or trademark.

(7) The use of the name of an agency or other nomenclature in type, size and location so as to have the capacity and tendency to mislead or deceive as to the true identity of the insurer is prohibited.

(8) The use of an address so as to mislead or deceive as to the true identity of the insurer or any other entity or its location or licensing status is prohibited.

(9) No insurer may use, in the trade name of its insurance policy, any terminology or words so similar to the name of a governmental agency or governmental program as to have the tendency to confuse, deceive or mislead the prospective purchaser.

(10) All advertisements used by agents, producers, brokers or solicitors of an insurer must have prior written approval or prior oral approval with subsequent written confirmation of approval by the insurer.

(11) An agent who makes contact with a consumer, as a result of acquiring that consumer's name from a lead generating device or from a list of prospective consumers compiled therefrom, or from an entity or individual providing such services, must disclose such fact in the initial contact with the consumer.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.12, Amended 6-12-88, Formerly 4-35.012.

4-150.115 Group or Quasi-Group Implications.

(1) An advertisement of a particular policy or contract shall not state or imply that prospective insureds become group or quasi-group members covered under a group policy or contract and as such enjoy special rates or underwriting privileges, unless

such is the fact. The term "enrollment" shall not be used except in connection with the offer of group insurance.

(2) No solicitation of a particular class, such as governmental employees, which state or imply that their occupational status of group members entitles them to reduced rates on a group or other basis when, in fact, the policy being advertised is sold only on an individual basis at regular rates.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.13, Amended 6-12-88, Formerly 4-35.013.

4-150.116 Introductory, Initial, or Special Offers.

(1) An advertisement of an individual policy shall not directly or by implication represent that a contract or combination of contracts is an introductory, initial, or special offer, or that applicants will receive substantial advantages not available at a later date, or that the offer is available only to a specified group or individuals, unless such is the fact. An advertisement shall not contain phrases describing an application period as "special", "limited", or similar words or phrases when the insurer uses such application or periods as the usual method of advertising Life Insurance and Annuity Contracts.

(2) An application period during which a particular insurance product may be purchased on an individual basis shall not be offered within this State unless there has been a lapse of not less than six months between the close of the immediately preceding application period for the same product and the opening of the new application period. The advertisement shall indicate the date by which the applicant must mail the application, which shall be not less than ten days and not more than forty days from the date that such application period is advertised for the first time. This rule applies to all advertising media, i.e., mail, newspapers, radio, television, magazines, and periodicals, by any one insurer. This prohibition shall not be applicable to solicitations of employees or members of a particular group or association which otherwise would be eligible under specific provisions of the insurance code for group insurance. The phrase "any one insurer" includes all the affiliated companies of a group of insurance companies under common management or control.

(3) This rule does not require separation by 6 months of application periods for the same insurance product in this State if the advertising material is directed by an admitted insurer to persons by direct mail on the basis that a common relationship exists with more than one entity. Examples of such would be a bank and its depositors, a department store to its charge account customers, or an oil company to its credit card holders, and more than one of such organizations is sponsoring such insurance product at different times if providing such insurance under such a method is not otherwise prohibited by law. However, the 6-month rule does apply to one specific sponsor to the same persons in this State on the basis of their status as customers of that one specific entity only.

(4) This rule prohibits any statement or implication to the effect that only a specific number of policies will be sold, or that a time is fixed for the discontinuance of the sale of the particular policy advertised because of special advantages available in the policy, unless such is the fact.

(5) The phrase "a particular insurance product" in Paragraph (2) of this Section means an insurance policy which provides substantially different benefits than those contained in any other policy. Different terms of renewability, an increase or decrease in the dollar amounts of benefits, or an increase or decrease in any elimination period or waiting period from those available during an application period for another policy shall not be sufficient to constitute the product being offered as a

different product eligible for concurrent or overlapping application periods.

(6) Except for modified and step rated policies or contracts, an advertisement shall not offer a policy or contract which utilizes a reduced initial premium rate.

(7) Meaningless awards, such as a "safe drivers award" shall not be used in connection with advertisements of Life Insurance and Annuity Contracts.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.14, Amended 6-12-88, Formerly 4-35.014.

4-150.117 Statements about an Insurer. An advertisement shall not contain statements which are untrue in fact, or by implication misleading, with respect to the assets, corporate structure, financial standing, age or relative position of insurer in the insurance business. An advertisement shall not contain a recommendation by any commercial rating system unless it clearly indicates the purpose of the recommendation and the limitations of the scope and extent of the recommendations. An advertisement shall not imply that a holding company or subsidiary of an insurer is a separate entity and responsible for the insurer's financial condition or contractual obligations unless such is the fact and it is fully disclosed.

Specific Authority 624.308 FS. Law Implemented 626.9641(1), (2) FS. History-New 9-1-73, Formerly 4-35.15, Formerly 4-35.015.

4-150.118 Application in Advertisement. Every application for an individual policy or in-state group life insurance policy or an annuity contract, or enrollment form for an out-of-state group contract which does not comply with Section 627.6515(2), F.S., must be taken by a Florida resident agent. Therefore, to assure compliance with Florida Statutes, no adver-

tisement for life insurance or an annuity contract in this State containing an application for a life insurance policy or annuity contract either for individual coverage, coverage under an in-state group policy, or an out-of-state group policy which does not comply with Section 627.6515(2), F.S., shall be used unless such application contains the name of the Florida resident agent or space for the Florida resident agent's signature, and, the completed application shall be returned to the Florida resident agent.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 624.428, 626.112, 626.784, 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1), 627.5515(6) FS. History-New 9-1-73, Formerly 4-35.16, Amended 6-12-88, Formerly 4-35.016.

4-150.119 Enforcement Procedures.

(1) Advertising File. Each insurer shall maintain at its home or principal office a complete file containing every printed, published or prepared advertisement of its individual policies and typical printed, published, or prepared advertisement of its group policies hereafter disseminated in this State with a notation attached to each such advertisement which shall indicate the manner and extent of distribution and the form number of any policy advertised. Such file shall be available for inspection by this Department. All such advertisements shall be maintained in said file for a period of either four years or until the filing of the next regular report or examination of the insurer, whichever is the longer period of time.

(2) Certificate of Compliance. Each insurer required to file an Annual Statement which is now or which hereafter becomes subject to the provisions of these rules must file with this Department with its Annual Statement a Certificate of Compliance executed by an authorized officer of the insurer wherein it is stated that to the best of his knowledge, information and belief the advertisements which were disseminated by the insurer during the preceding statement year complied or were made to

comply in all respects with the provisions of these rules and the Insurance Laws of this State as implemented and interpreted by these rules.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.17, Amended 6-12-88, Formerly 4-35.017.

4-150.120 Filing for Review.

(1) The Commissioner may, in his discretion, require the filing with the Department, for review prior to use, of any life insurance and annuity contract advertising material of an insurer or particular insurers. Such advertising material must be filed by the insurer with this Department not less than thirty (30) days prior to the date the insurer desires to use the advertisement.

(2) An insurer shall file with the Department any or all life insurance and annuity contract advertising material, except for Institutional Advertisements, used or intended for use in the state, when such advertisement or others which do not materially differ are broadcast via television or radio or transmitted by cable to any area or areas whose aggregate population comprises more than 25% of the total population of the state according to the last decennial census. Such advertisements shall be filed on audio or audio/visual tapes as appropriate using either the actual spokesperson or a "stand-in." An audio/visual tape shall be on VHS format. The advertising material may be filed thirty (30) days prior to the date the insurer intends to use the advertising, or may be filed contemporaneously with the date intended for use. If the insurer files at least thirty (30) days prior to use, and the Department has not issued a preliminary notice of violation within fifteen (15) days after such filing, and there are not material changes in the production of the advertisement, the insurer shall not be penalized for any use of the advertisement which occurs within thirty (30) days after receipt of any sub-

sequent preliminary notice asserting that the advertisement is in violation of these rules.

(3) Subsection (2) above, shall be effective sixty (60) days after the effective date of these rules. Subsection (2) shall not apply to advertising material used by an insurer prior to the effective date of these rules; provided, however, the Commissioner may request, in his discretion, that an insurer submit any such advertisement to the Department.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 6-12-88, Formerly 4-35.0171.

4-150.121 Severability Provision. If any section or portion of a section of these rules, or any amendment thereto, or the applicability thereof to any person or circumstance is held invalid by a court, the remainder of the rules, or the applicability of such provision to other persons or circumstances, shall not be affected thereby.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.18, Amended 6-12-88, Formerly 4-35.018.

4-150.122 Prior Rules. These rules supersede and constitute a revision of all prior rules pertaining to solicitation and sale of Life Insurance and Annuity Contracts.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 6-12-88, Formerly 4-35.020.